UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARCIA J. MCCRAY, Appellant, v. DEPARTMENT OF THE NAVY,[1] Agency.	DOCKET NUMBER AT-0752-97-0981-I-1 DATE: October 28, 1998

Ann Reynolds, Jacksonville, Florida, for the appellant.

David J. Rowland, Esquire, Albany, Georgia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision, issued December 31, 1997, that dismissed her appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal to the regional office to conduct a jurisdictional hearing.

[1] The initial decision incorrectly listed the agency as the U.S. Postal Service.

BACKGROUND

¶2 On June 9, 1997, the appellant submitted a letter of resignation from her position as a GS-05 Secretary, which became effective June 20, 1997. Initial Appeal File (IAF), Tab 4, Ex. A. On September 4, 1997, she filed an appeal with the Board's Atlanta Regional Office in which she asserted that her resignation was coerced and constituted a constructive discharge. IAF, Tab 1. She requested a hearing. *Id.*

¶3 On September 5, the administrative judge (AJ) issued an Order advising the appellant that resignations are presumed to be voluntary, and therefore outside of the Board's jurisdiction. The Order further advised that the appeal would be dismissed unless the appellant amended her petition to allege that her resignation was the result of duress, coercion, or misrepresentation by the agency,[2] and directed her to submit evidence and argument to prove that the appeal was within the Board's jurisdiction. IAF, Tab 2. The appellant responded with additional factual assertions to support her contention that her resignation had been coerced. IAF, Tab 3. The agency filed a motion to dismiss the appeal as untimely.[3] IAF, Tab 4.

¶4 In dismissing the appeal, the AJ stated that the appellant had not responded to the September 5 Order. Initial Decision (ID) at 2, IAF, Tab 6. He did, however, examine the assertions the appellant had made in her original filing.

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[2] The Order did not acknowledge that the appellant had already made such allegations.

[3] The initial decision does not address the timeliness issue.

ANALYSIS

The AJ erred in not providing the appellant with explicit information on what was required to establish jurisdiction, and in failing to consider the appellant's response to the September 5 Order.

¶5 A resignation is presumed to be a voluntary act and, therefore, beyond the Board's jurisdiction. *Braun v. Department of Veterans Affairs*, 50 F.3d 1005, 1007 (Fed. Cir. 1995). If, however, an agency has coerced a resignation, it constitutes a "constructive removal" over which the Board can exercise jurisdiction. *See id.* An appellant is entitled to a hearing on the issue of Board jurisdiction involving an allegedly involuntary resignation or retirement if she makes a nonfrivolous allegation casting doubt on the presumption of voluntariness. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985).[4] An appellant must receive explicit information on what is required to establish a right to a jurisdictional hearing. *Id.* at 643-44.

¶6 The appellant specifically alleged in her petition for appeal that she had been constructively discharged. IAF, Tab 1 at Para. 12. This allegation was not acknowledged in the AJ's September 5 Order directing the appellant to submit evidence and argument to establish jurisdiction.[5] The first time that the AJ provided the appellant with specific information as to what is required to establish jurisdiction of her resignation as a constructive discharge under an intolerable working conditions theory was in the initial decision dismissing the appeal. Not only did the AJ fail to notify the appellant of what would be required to establish jurisdiction, he also failed to consider the appellant's pleading filed in response to the September 5 Order.

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[4] A nonfrivolous allegation is one that, if proven, could make a prima facie case of involuntariness. *Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed. Cir. 1986).

[5] We note that there was a substitution of AJs following the issuance of the September 5 Order. *See* IAF, Tab 5.

¶7 Although the Board will not consider evidence or argument submitted for the first time in a petition for review unless the party shows that it was unavailable when the record below closed, *see* 5 C.F.R. § 1201.114(d)(1), the Board will consider such evidence and argument when an appellant is not notified of what is required to establish jurisdiction until the issuance of the initial decision, *see, e.g.*, *Shivaee v. Department of the Navy*, 74 M.S.P.R. 383, 386 (1997); *Sweeney v. Department of the Interior*, 73 M.S.P.R. 329, 334 (1997). We therefore consider the evidence and argument made in the appellant's petition for review, as well as that made in her response to the September 5 Order which was not considered by the AJ, in determining whether the appellant has made nonfrivolous allegations of fact that would entitle her to a jurisdictional hearing.

The appellant is entitled to a jurisdictional hearing because she has made nonfrivolous allegations supporting her contention that she was constructively discharged.

¶8 In *Heining v. General Services Administration*, 68 M.S.P.R. 513, 519 (1995), the Board recognized that allegations of coerced resignations or retirements tend to fall into one of two scenarios: when the agency has proposed or threatened an adverse action and the employee resigns or retires in the face of the impending action; or when the agency takes actions that make working conditions so intolerable that the employee is driven to an involuntary resignation or retirement. In both scenarios, the issue of voluntariness rests on whether the totality of the circumstances supports the conclusion that the employee was effectively deprived of free choice in the matter, and application of this test must be gauged by an objective standard rather than by the employee's purely subjective evaluation. *Id.* at 519-20. Applied to the case of a constructive discharge alleged to be due to intolerable working conditions, the ultimate question is "whether under all the circumstances working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to resign." *Id.* at 520. As discussed below, we find that the appellant has made

nonfrivolous allegations that entitle her to a jurisdictional hearing in which she would have an opportunity to prove that her resignation meets this standard.

¶9 In 1994, the appellant and the agency entered into a settlement agreement to resolve an EEO complaint which she had filed against the agency in 1992. She claimed that the agency, and in particular "responsible management officials" (RMOs) she had named in her 1992 complaint, engaged in a pattern of reprisal against her following the settlement agreement. IAF, Tab 1. She alleged that this pattern of reprisal included denial of promotions, training, and assignments, a hostile work environment, and defamation of character. Among her allegations of such reprisal are the following[6]:

- She did not receive a promotion in six years while she watched her white co-workers receive promotion after promotion. Unlike her co-workers, her position was singled out for a "desk audit."
- She was denied training unless the cost was less than $100, whereas training was approved for other employees that cost as much as $1,000. The appellant stated her belief that the denial of training was a means to prevent her from receiving any promotions.
- RMOs advised new employees that the appellant was "dangerous," and a "troublemaker" who "would write anyone up." As a result of these negative comments, co-workers have avoided her and isolated her in the workplace. She adds that she has further isolated herself to avoid intentionally derogatory comments.
- Her desk was frequently "trashed," her desk drawers were rifled, and her name tag turned backwards inside its holder so that her name was not visible. Her chair would sometimes be adjusted so that it could tilt forward in a forceful manner, possibly causing injury to her.
- The "continuous use of obscene and vulgar language used by the Marines and a few civilians were [sic] intolerable."
- During a Division meeting in February 1997, an officer made negative statements about her that were untrue, and, when she tried to defend herself, she was told to shut up.

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[6] The description which follows is not exhaustive or all-inclusive, but rather illustrative in nature.

- On April 4, 1997, Lt. Col. Rogers (the appellant's supervisor) directed profanity at her and made a comment she took as a threat. IAF, Tab 3.

¶10 The appellant alleges that the above sorts of occurrences adversely affected her work performance and her health. She states there were times when she woke up with severe headaches and stomach problems, and had to call in sick. She states that her work environment deteriorated to the point that, "On a daily basis, I found it very difficult to go to work each morning."[7] She reports that she had a discussion with Lt. Col. Rogers on April 28, 1997, in which she told him she needed to go on leave because she was stressed out and suffering from mental anguish. She asserts that she told him that she would take at least two weeks of annual leave, and if that was not enough, she would request leave without pay. After returning from that leave, she requested leave without pay. She apparently submitted her resignation only after her request was denied. IAF, Tab 1.

¶11 To establish entitlement to a jurisdictional hearing, an appellant need not allege facts which, if proven, definitely would establish that the resignation was involuntary; she need only allege facts which, if proven, could establish such a claim. *See Braun*, 50 F.3d at 1008; *Dumas*, 789 F.2d at 894. As the court stated in *Braun*:

> We further hold that Mr. Braun has made a non-frivolous allegation that, if proven, could establish that his resignation was coerced. This non-frivolous allegation is all that is required to trigger the Board's jurisdiction at this threshold stage. It would be illogical to require a petitioner to prove in advance by preponderant evidence that a resignation or retirement was involuntary to secure a hearing on that very issue. When there is a question as to the voluntariness of the petitioner's resignation or retirement, and the petitioner makes a non-frivolous allegation of the involuntariness of the resignation or

[7] On review, the appellant has submitted a medical report from her physician to support her claim that her job situation caused her medical problems. Petition for Review File, Tab 3. In light of our finding that the appellant has made nonfrivolous allegations entitling her to a jurisdictional hearing, the AJ should consider this evidence on remand.

> retirement, an evidentiary hearing is required to determine whether the resignation or retirement was in fact involuntary.

50 F.3d at 1008 (citations and footnote deleted). *See also Hurwitz v. Department of the Army*, 61 M.S.P.R. 436, 440 (1994) (finding that the AJ erroneously suggested that the appellant needed to prove duress in order to gain the right to a hearing, when she was only required to nonfrivolously allege it).

¶12 We hold that the facts alleged by the appellant are sufficient to entitle her to a jurisdictional hearing.[8] If the AJ finds that the appellant has established jurisdiction over her appeal, he should then adjudicate whether the appellant has established good cause for the untimely filing of her appeal. *See Jones v. U.S. Postal Service*, 66 M.S.P.R. 594, 598 (1995).

ORDER

¶13 Accordingly, the appeal is REMANDED to the regional office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.

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[8] We note that one of the reasons cited by the AJ in rejecting the adequacy of the allegations of coercion contained in the appellant's initial filing was that a reasonable person in the appellant's position, given her success in an earlier EEO proceeding, would have filed another EEO complaint rather than submitting a resignation. In her petition for review, the appellant addressed this issue, stating that she made a number of unsuccessful, informal attempts to utilize the agency's EEO process to address her work situation, causing her to "lose faith in the EEO process." PFR File, Tab 1. On remand, the AJ should reevaluate this issue based on all the evidence of record, including testimony at the jurisdictional hearing.